In The Supreme Court of the United States

EDWARD E. KRAMER,

Petitioner,

v.

DARYL VON YOKELY
and
KENNETH MUHAMMAD,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Georgia

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether the granting of summary judgment when there are significant materially disputed facts before the Court violates the Seventh Amendment and constitutional precedent?

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JURISDICTION

The final judgment of the Supreme Court of Georgia was rendered on October 27, 2008. The statutory provision conferring jurisdiction on the Supreme Court of the United States to review on a writ of certiorari is 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT VII – In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rule of the common law.

AMENDMENT XIV. SECTION I - ...nor shall any State deprive any person, of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws; nor deny to any person within its jurisdiction equal protection of the laws.

STATEMENT OF THE CASE

Petitioner, while incarcerated in the Gwinnett County Detention Center as a pre-trial detainee, was attacked by a jail guard during a scheduled training exercise resulting in traumatic brain injury and spinal cord impairment and resulting in permanent impairment to control his body functions below his neck including his breathing, requiring his use of a machine to assist his breathing. Petitioner filed suit under 42 U.S.C. Section 1983 in the United States District Court for the Northern District of Georgia, Civil Action No. 1:02-CV-2124-ODE, for excessive force and deliberate indifference for his serious physical injury as well as for deliberate indifference to his serious medical need for his brain injury and allowing Petitioner's psoriatic and arthritic illnesses escalate to life-threatening levels.

In response to two motions for more definite statement of his claims, the Respondents who are his attorneys that filed his suit in District Court filed an amended complaint alleging deliberate indifference to the Petition's serious medical needs, violation of the Eight Amendment and a state claim for assault and battery. The Defendants' filed a motion for summary judgment to which the Respondents as his attorneys failed to properly respond to Petitioners excessive force claim and failed to separately respond in detail to every numbered statement of undisputed material facts enumerated in an accompanying document by the Defendants' Motion that required to be individually answered by Respondents as counsel for the Petitioner in accordance with Local Rule 65.1(B)(2). The Respondents as counsel for the Petitioner respond

only with a brief in opposition and a general denial statement, "The facts in this case are voluminous. Plaintiff incorporates the exhaustive facts alleged in the Complaint and in the Facts portion of his brief as if fully stated herein."

Because of the failure to file a separate response to the Defendants' statement of undisputed material facts, District Court Judge Evans assumed every fact as alleged by the Defendants were deemed as admitted, "Thus Plaintiff has failed to oppose any of Defendants' material facts and all of Defendants' numbered facts are deemed admitted." 306 F. Supp. 2d 1291, 1221 (2004). The District Court further struck detention center medical records and three exhibits that were attached to Plaintiff's response that were not properly certified and authenticated by Respondents as well as striking an affidavit of a previously undisclosed medical expert. The District Court based on the assumed undisputed material facts granted the Defendant's motion for summary judgment. Although the District Court stated that facts were referenced from Plaintiff's response in an effort to determine the contentions put forth by the Plaintiff, the District Court definitely did not consider the Plaintiff's excessive force and deliberate indifference claims for his very serious traumatic brain injury and spinal cord injury and only considered Plaintiff's claims for inadequate medical care. *Id* at1227.

Petitioner appealed the District Court's granting of summary judgment to the Eleventh Circuit Court of Appeals which affirmed the District Court's striking as unauthenticated three of the exhibits attached to Plaintiff's response to the

Defendants' motion for summary judgment, and by concluding that the undisputed evidence showed that the Defendants were not deliberately indifferent to Plaintiff's serious medical needs." (A-7). Plaintiff's motion for rehearing and rehearing en banc was denied. Plaintiff's Petition for Writ of Certiorari was denied. (A-2).

Petitioner filed suit in the Superior Court of Fulton County, Georgia, Civil Action No. 2006-CV-113356, for legal malpractice against the Respondents who were his previous attorneys and who did not properly respond to the motion for summary judgment resulting in summary judgment being granted in favor of the Defendants. The filing of the state legal malpractice case was accompanied by the filing of an affidavit of G. Brian Spears, a Georgia attorney specializing in civil rights cases testifying to the gross legal malpractice committed by the Respondents. The Respondents filed for summary judgment. Judge Brasher found that Petitioner's attorneys, "were woefully deficient in their representation of the Plaintiff in their federal lawsuit. As pointed out by the judge, their shortcomings resulted in the loss of the Plaintiff's case as a matter of law." Nevertheless Judge Brasher found that because of the decision of the District Court that was based on the assumed undisputed facts that because the Plaintiff did not prevail in the federal court case that he could not prevail in the malpractice case. (A-3 at 3).

Petitioner appealed to the Court of Appeals of Georgia raising grounds that the Superior Court erred in relying on the District Court's Order entered in the federal case, ruled as a matter of law

that the Petitioner failed to show that his attorneys' alleged errors proximately caused the outcome of the federal case and ruling that his attorneys' failure to properly contest summary judgment was adjudged abandonment of his excessive force and deliberate indifferent claims for his catastrophic next injury would not support a malpractice claim as a matter of law. The Court of Appeals of Georgia affirmed the Superior Court of Fulton County, Georgia primarily relying on the summary judgment decision by the District Court.

Petitioner filed a Petition for Writ of Certiorari to the Supreme Court of Georgia which was denied as was his motion for reconsideration.

STATEMENT OF FACTS

As the direct result of the actions of Gwinnett County Detention Center deputies on October 4, 2000 and staff and Prison Health Systems, Inc. ("PHS") medical staff and employees, Petitioner became totally disabled with traumatic brain injury and it is not likely that he will ever be able to work or function normally again. Petitioner was found permanently disabled by Federal Administrative Law Judge Dana E. McDonald's Decision stating "The claimant [Edward E. Kramer] has been under a disability since October 4, 2000 (20 CFR §§404.1520(d) and 416.920(d))."

Following the disabling injuries to his neck as a pre-trial detainee at the Gwinnett County Detention Center, Petitioner was kicked and prodded to get up by deputies despite being unable move which was witnessed by other detainees and a PHS Nurse. As the result of the obvious excessive force, Petitioner received traumatic brain injury caused by damage to the vertebrae of his cervical spine, for which Dr. Glenn Parris testified to as an expert witness in Gwinnett County Court during a medical review hearing on November 6, 2000, indicating that an MRI performed nearly a month following the disabling injury showed new damage to his cervical spine region and that lack of immediate treatment:

> [C]ould result in spinal cord damage and paralysis -- loss of function of anything below the level of the neck. He [Mr. Kramer] could lose all ability to walk, talk, breathe lower segments of

the respiratory tract, and functions of bowel and bladder.

Dr. Parris also testified that the ordered medical follow-up had not occurred and lab tests had not been administered. Defendant PHS Medical Administrator Gephardt, responding directly to Judge Turner, could not explain the lack of medical referral for neurosurgery or the failure to perform the required lab work.

On December 1, 2000, Petitioner was assaulted by a masked Sheriff's Deputy during a planned "drill," during which his head was intentionally slammed into a concrete wall. The unprovoked attack on the now legally disabled Petitioner was witnessed and documented in affidavit to the Court. Petitioner was permitted to go to the jail's PHS medical unit, but not permitted to be examined by a physician. Medical Records describe the golf-ball size contusion with chronic hematoma on the right side of his forehead as result of the attack. This second attack left permanent scarring directly upon the disabled Petitioner's spinal cord.

Petitioner had engaged the Respondent attorneys because of their purported specialty in handling traumatic brain injury cases and access to and use of neurological medical experts, yet no medical expert witnesses promised by the Respondents ever materialized. Plaintiff made appointments for Respondent Muhammad to call and meet Plaintiff's own physicians, however,

Muhammed spoke to only one, and met none in person.

A single page statement sent to Dr. Freedman, Petitioner's dermatologist, to sign and fax back, was the only medical expert testimony for a traumatic brain injury which has left the Petitioner 100% legally disabled. By this point, Petitioner had eight physicians that Respondents Yokely and Muhammad were provided to choose from, including a neurologist and neurosurgeon, who operated on his cervical spine in 2001 and noted permanent damage on his spinal cord as result of the injuries sustained as a pre-trial detainee at the Gwinnett County Detention Center ("GCDC"), and a physiatrist at Shepherd Center Catastrophic Care Hospital, where Plaintiff received ongoing spinal treatment.

In the District Court's decision for Summary Judgment filed against Gwinnett County and Prison Health Services, Inc. ("PHS"), *et. al.* in the Northern District of Georgia, Judge Evans wrote:

Local Rule 56.1B(2) provides,

> The respondent to a motion for summary judgment shall attach to the response a separate and concise statement of material facts, numbered separately, to which the respondent contends there exists a genuine issue to be tried. Response should be made to each of the movant's numbered material facts. All material facts contained in the moving party's statement which

> are not specifically controverted by the respondent in respondent's statement shall be deemed to have been admitted. N.D. Ga. R. 56B(2) (emphasis added).
>
> Plaintiff-respondent failed to comply with this rule, and instead, filed a pleading which stated, "The facts in this case are voluminous. Plaintiff incorporates the exhaustive facts alleged in his Complaint and in the Facts portion of his brief as if fully stated herein." Thus, Plaintiff has failed to oppose any of Defendants' material facts, and all of Defendants' numbered facts are deemed admitted. *See Jackson* v. City of Stone Mountain, 232 F. Supp. 2d 1337, 1341 (N.D. Ga. 2002).

Under Local Court Rule 7.1 of the United States District Court for the Northern District of Georgia, factual and legal claims to which there is no response should be treated as unopposed. Judge Evans continued:

> Having failed to respond to many of Defendants' arguments and having defended only his Section 1983 claim for deliberate indifference to a serious medical need, Plaintiff is found to have abandoned all other asserted

> claims. Accordingly, the only claim remaining on summary judgment is Plaintiff's claim for constitutionally inadequate medical care.

In a footnote, Judge Evans notes "This finding is in keeping with Plaintiff's counsel's statement during the July 17, 2003 motion hearing that the only issue in this action is whether the medical treatment provided to Plaintiff while incarcerated constituted deliberate indifference to a serious medical need." Petitioner was intentionally not informed of the hearing and did not authorize any abandonment of the excessive force cause of action that left him 100% totally disabled.

In their Motion for Summary Judgment, PHS and Gwinnett County moved to strike of the exhibits entered by Muhammad on the basis that the exhibits were neither sworn, certified, authenticated, nor otherwise presented in compliance with rules of the Court (Fed. R. Civ. P. 56(e)). The photographs of psoriatic lesions covering over 90% of my body were stricken, because Muhammad never thought to show them to Dr. Freedman, who could readily ID them (and subsequently had in an Affidavit for the Legal Malpractice Action against Yokely and Muhammad).

Judge Evans denoted that "Exhibits 2 and 3 are collections of unidentified documents. Plaintiff urged that the documents should not be stricken because Defendants authenticated these very same documents for use in their motion for summary judgment."

Even as Judge Evans tried to see Muhammad's Response in its most favorable light, Respondents were in gross default of replying to each and every "material fact" postured.

Judge Evans expressed that she was left to own conclusions, reading and interpreting the Exhibits, medical records and test results for which she has no standards or qualifications, and figure out how they may fit. Such conjectures on the part of Judge Evans resulted in her denoting:

> On December 1, 2000, Plaintiff's neck was allegedly injured in a security drill at the GCDC. In response to his complaints, after noting no signs of external injury, PHS nurses treated Plaintiff with Tylenol and Motrin. A follow-up examination by a PHS physician led to a ten-day course of Motrin combined with a muscle relaxer.

The witnessed assault (the affidavit by David Foster was accepted and on record with the Court) resulted in such great swelling to his forehead, that the unit Deputy had Petitioner immediately transferred to medical (instead of just filing a request). Gephardt, who placed the documentation of MRI indicating the 10/4/2000 spinal injury and heard Dr. Parris' testimony on the documented damage already done, admitted in deposition that she could a transfer a patient to an ER -- but, in Petitioner's case deliberately refused to do so.

Further, Gephardt admitted in deposition that the PHS medical unit was medically "uncertified" at the request of the Gwinnett County Board of Commissioners, and that at the time of her decision to not allow Plaintiff medical care, her own highest level of education was a high school diploma (which itself would not allow the unit medical certification). Following numerous inmate deaths at the Gwinnett County Detention Center related to inadequate medical treatment, PHS "relocated" Gephardt to an undisclosed PHS-contracted facility.

Dr. Parris' Affidavit in the Legal Malpractice Action against Respondents Yokely and Muhammad entered in Fulton County Superior Court, a statement that Judge Evans never had the opportunity to see, concludes:

> Given that there were two hearings before Judge Turner, with testimony from both jail and PHS administrators, I believe that all of the responsible Sheriff's Department administrators, officers and employees, and Prison Health Services, Inc. administrators, officers and employees were aware of Mr. Kramer, his declining conditions, and his Ordered medical needs. I believe the medical treatment Mr. Kramer received was so inadequate as to constitute deliberate indifference and I would find it extremely unlikely that these people at Gwinnett County Sheriff's Department and Prison Health Services, Inc. were not aware of what as happening to him.

> I have examined Mr. Kramer's complete jail medical records, and I have reviewed the treatment that he received from [PHS] Doctors Scheib, Fajardo and Majoch. The treatment they provided was so cursory and inadequate as to amount to no treatment at all. I consider such treatment to be deliberately indifferent.

Had Muhammad taken the time to review and prepare with Dr. Freedman the Affidavit for which he had agreed to enter, it concluded:

> I have reviewed pictures of Edward Kramer and would have testified that they were true and accurate depictions of Mr. Kramer's condition, document the extreme condition of disease progression. The pictures are attached as an exhibit to this affidavit.
>
> I diagnosed that Mr. Kramer developed a documented lice infestation as result of being housed at the jail in an environment woefully inadequate for his medical needs. I also diagnosed that Mr. Kramer, while at the jail, developed community associated Methicillin-resistant Staphylococcus Aureus (CA-MRSA). As required by law, I filed Mr. Kramer's incidence of CA-MRSA with The Centers for Disease Control and Prevention (CDC).

> In addition, I believe based on my examination of Mr. Kramer and my expert knowledge of psoriasis as a medical practitioner specializing in all aspects of this disease, that Mr. Kramer endured excruciating pain over a long period of time for absolutely no reason at all. I cannot characterize the treatment Mr. Kramer received in any other way than deliberately indifferent.

Muhammad and Yokely complained in their response that such Affidavits never appeared, apparently out of thin air, for them, still failing to address that none of Plaintiff's other physicians or Respondent's own expert medical witnesses were even contacted. Attorneys that would engage a case involving traumatic brain injuries with life-long consequences to a Plaintiff would clearly expect to talk with and possibly even make the time to meet with the Plaintiff's physicians to best understand their medical diagnosis of a case.

While Judge Evans, mocking Muhammad's conjecture in his initial Response, "The facts in this case are voluminous," found it insufficient as an answer to the material facts of the case, Muhammad in a sense is correct. The case presented against Gwinnett County and PHS, et. al., had not only significant documentation and medical records that were never properly presented to the Court, disclosed that Petitioner, who after six surgeries as a direct result of the injuries at the hands of PHS and GCDC, will never return to the point of health or independence as when he begun his incarceration on August 25, 2000.

REASONS FOR GRANTING THE PETITION

THE GRANTING OF SUMMARY JUDGMENT WHEN THERE ARE SIGNIFICANT MATERIAL FACTS DEMONSTRATING A MERITORIOUS CAUSE OF ACTION VIOLATES THE SEVENTH AMENDMENT

This case presents an opportunity for the Supreme Court to revisit the recent trend of courts to overuse summary judgment even in the face of disputed material facts to dispose of cases that is unfairly biased toward defendants. In light of the renewed interest in the proper role of jury under the Sixth Amendment giving power back to criminal juries[1], it is submitted that it is fitting for the Court to examine the virtual denial of jury trials wrought by the explosion of the use of summary judgment to especially dispose of civil rights cases in contravention of the constitutionally preserved right to civil jury trials under the Seventh Amendment.[2]

The Petitioner presented factual evidence in his District Court civil rights case that was grossly excessive force and constitutional violation of Petitioner's civil rights as articulated in *Farmer v. Brennan*, 511 U.S. 825 (1994) as well as deliberate indifference to Petitioner's serious medical needs as required by *Estelle v. Gamble*, 429 U. S. 97 (1976). And that following the granting of summary

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[1] United States v. Booker, 543 U.S. 220 (2005); Blakley v. Washington, 542 U.S. 296 (2004); Ring v. Arizona, 536 U.S. 584 (2002); Apprenti v. New Jersey, 530 U.S. 466 (2000).

[2] See Judge Bennett's dissenting opinion in *Kampouris v. St. Louis Symphony Society*, 210 F. 3d 845, 850 (8th Cir. 2000) cautioning against the "expanding use of summary judgment" and its "ominous spector of serious erosion of the 'fundamental and sacred' right of trial by jury."

judgment against the Petitioner civil rights causes of action, the Petitioner presented evidence in state court that his attorneys' had committed legal malpractice, but again his right to redress before a jury was cut short by summary judgment based on improper and unconstitutional fact finding of the district court in his civil rights case in district court.

The infliction of repeated traumatic brain injuries demonstrates *ipso facto* using extreme and excessive force brutally abusing the Petitioner. *Hudson v. McMilliam,* 503 U.S. 1 (1992), instructs that the Eighth Amendment prohibits the unnecessary and wanton infliction of pain and held that corrections officers inflict cruel and unusual punishment if they use deliberately without cause use excessive force to cause harm, rather than in a good-faith effort to maintain or restore discipline, regardless of whether significant injury resulted. *Hudson* instructs:

> When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated. See *Whitley, supra,* at 327. This is true whether or not significant injury is evident. Otherwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury. Such a result would have been as unacceptable to the drafters of the Eighth Amendment as it is today. See *Estelle, supra,* at 102 (proscribing torture and barbarous punishment was "the primary concern of the drafters" of

the Eighth Amendment); *Wilkerson* v. *Utah*, 99 U.S. 130, 136 (1879) ("It is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by [the Eighth Amendment]") *Id.* at 9.

The Eighth Amendment's prohibition of "cruel and unusual" punishment necessarily excludes from constitutional recognition *de minimis* uses of physical force, provided that the use of force is not of a sort " repugnant to the conscience of mankind.'" *Whitley*, *supra*, at 327 (quoting *Estelle*, *supra*, at 106) (internal quotation marks omitted).In this case, the Fifth Circuit found Hudson's claim untenable because his injuries were "minor." 929 F. 2d, at 1015. Yet the blows directed at Hudson, which caused bruises, swelling, loosened teeth, and a cracked dental plate, are not *de minimis* for Eighth Amendment purposes. The extent of Hudson's injuries thus provides no basis for dismissal of his § 1983 claim. *Id.* at 10.

The constitutional protections of the Eighth Amendment imported to the States through the Fourteenth Amendment prohibits "inflicted unnecessary and wanton pain and suffering." *Whitley v. Albers*, 475 U.S. 312, 320 (1986). The Fourteenth Amendment applies directly to state

action to restrain prisoner abuse in pretrial detention.

The granting of summary judgment to the Defendants closes the courthouse door to the Plaintiff who was severely injured by prison guards under color of law that is certainly actionable as a gross violation of his civil rights and Plaintiff has been foreclosed by summary judgment in state court from pursuing a legal malpractice case against his attorneys for not property pursuing his civil rights case in federal court.

Not only is summary judgment improper under the Supreme Court's summary judgment trilogy where the Petitioner has presented material factual issues, the over use of summary judgment has called into question its constitutionality under the Seventh Amendment.[3] The Seventh Amendment explicitly preserves the right to trial by jury according to the rules of common law in 1791.

John Bronsteen[4] sets out the empirical studies against summary judgment as inefficient and costly as well as extremely pro defendant virtually replacing settlement and trials as resolving disputes to the detriment of plaintiffs. Not only does summary judgment create a systemic bias favoring defendants, but as Thomas develops that summary judgment is fundamental unconstitutional in violation of the Seventh Amendment. [5]

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[3] Thomas, Suja A., *Why Summary Judgment is Unconstitutional,* Virginia Law Review, Vol. 93:129 (2007); Bronsteen, John, Against Summary Judgment, The Georgia Washington Law Review, Vol. 75:522 (2008)

[4] Bronsteen, supra.

[5] Thomas, supra.

For over a century *Fidelity & Deposit Co. v. United States,* 187 U.S. 315 (1902) has been cited a constitutional precedent for summary judgment, but Fidelity & Deposit accepted the facts alleged by the nonmoving party as true and was in the nature of a judgment on the pleadings not considering evidence presentations as in summary judgments. *Parklane Hosiery Co. v. Share*, 439 U.S. 322 (1979) cited *Fidelity & Deposit* in *dicta* for the proposition that "summary judgment does not violate the Seventh Amendment which only decided non-mutual collateral estoppel and not summary judgment review of evidence.

Next the United States Supreme Court decided a summary judgment trilogy of 1986: *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242 (1986); *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) requiring factual evidence and inferences to be viewed most favorable to the plaintiff: "If the defendant in a run-of-the-mill civil case moves for summary judgment ... based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Anderson v. Liberty Lobby* at 252. [Emphasis supplied.] In answering this question, the federal trial judge must view the inferences to be drawn from the underlying facts in the light most favorable to the plaintiff. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-159 (1970).

Proper application of those principles demonstrates that the Plaintiff is entitled to present his case on the merits to the trier of fact. Indeed, the material facts, and the inferences to be drawn from those facts as to which there are genuine – indeed diametrically opposed – are to be determined in favor of the Plaintiff's demonstrated facts and inferences.

Plaintiff's own sworn testimony in his filed deposition, filed eye witness affidavits, and affidavits of expert witnesses will prevent the entry of judgment prior to trial, so long as the evidentiary tests of the Supreme Court and the Eleventh Circuit are met. In the words of *Matsushita,* more is required than "metaphysical doubt as to the material facts." 475 U.S. at 586. But, if the record, taken as a whole, could lead a rational fact trier to find for the nonmovant, there is a "genuine issue for trial." *Id.* at 587.

Even though in artfully presented by the Petitioner's attorneys, the response to the Defendants' motion for summary judgment in the District Court expressly briefed and cited to filed sworn testimony in the fact portion of the response establishing the Petitioner's cause of action for his traumatic brain injury on December 1, 2000 that severely injuries his cervical spine leaving him 100% disabled, then a subsequent targeted attack by a masked sheriff's deputy upon the Plaintiff on December 12, 2000, resulting in additional injury and spinal cord damage, citing verbatim the testimony of the Plaintiff's deposition describing the excessive use of force as well as his physician describing the severe injury to his cervical spine by the deputy. (Plaintiff's Response to Summary

Judgment, pp. 23-25). It was further and argued in the Arguments and Citation of Authority Section:

> ...a MRI ordered by Mr. Kramer's rheumatologist on his behalf revealed damage to Mr. Kramer's C6-C7 region.... The December 1st incident in which Mr. Kramer was physically assaulted constitutes an Eighth Amendment violation itself. The United States Supreme Court has held that the use of excessive force against inmates may constitute cruel and unusual punishment. *Hudson v. McMillian*, 503 U.S. 1, 112 S.Ct. 995 (1991). "When a prison security measure is undertaken to resolve a disturbance... that indisputably poses significant risks to the safety of inmates and prison staff, [the Supreme Court held] the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on whether the force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Whitley v. Albers*, 475 U.S. 312, 106 S. Ct. 1078 (1985).
>
> Utilizing this standard s pronounced by the United States Supreme Court, the issue presented is whether the "drill" conducted by the Gwinnett County Rapid Response Team, call for Mr. Kramer's head and

> neck to be pushed with brute force into the cell. Id. It is undisputed that at the time of the incident there was no breach in discipline which needed to be restored. Captain Simms of the Gwinnett County sheriff's department states that it was only a drill. Consequently, there was no reason to harm Mr. Kramer other than the deputy's personal desire to practice his techniques and demonstrate his ability to subdue an individual and cause pain. Practicing assault techniques on inmates is not a "good faith effort to maintain or restore discipline" Id. As a result, the pain inflicted upon Mr. Kramer, and the damage caused to his head and neck, and back, constituted cruel and unusual punishment in violation of the constitution. (Plaintiff's Response to Summary Judgment, pp.34-35).

In spite of presenting of sworn testimony by the Plaintiff and his physician as to the grossly excessive force as well as citing to the controlling Supreme Court precedent for excessive force, the District Court in order the grant summary judgment ruled that the Plaintiff had abandoned his excessive force claims.

In the state court legal malpractice action, the Petitioner again presented sworn material facts in response to the Respondents' motion for summary judgment as well as the affidavit of Brian Spears, a Georgia attorney specializing in civil rights cases,

detailing the malpractice that had been committed by the Respondents including not properly responding to the Defendants' motion for summary judgment in District Court which was the proximate cause of the granting of summary judgment on all the Petitioner's causes of action including the excessive force claim causing him to be 100% permanently disabled. (Affidavit of Brian Spears). However, the Superior Court ruled that although the Respondents had committed legal malpractice that because of the findings of fact by the District Court against the Plaintiff that the Respondents were entitled to summary judgment.

Thus the Petitioner has been ruled against in two summary judgments when there was clear and convincing evidence that he had been subjected to an unprovoked attack by the deputies resulting in traumatic brain injury (the second such perpetrated upon the Petitioner within sixty days) using excessive force that caused spinal cord damage and rendered him totally disabled and again the underlying state court action when the facts were presented that his attorneys committed malpractice.

Where is Petitioner's right to trial by jury guaranteed by the Seventh Amendment?

CONCLUSION

It is submitted that granting this Petition for Writ of Certiorari will give the Supreme Court an opportunity to give direction to the overuse of summary judgment and put meaning in the Seventh Amendment's right to trial by jury in civil cases.

Respectfully submitted,

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APPENDIX

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SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

Date: October 27, 2008

Case No. S08C1556

KRAMER V. YOKELY ET AL.

COURT OF APPEALS CASE NOS. A07A1977, A07A1978

The Supreme Court today denied the motion for reconsideration.

All the Justices concur.

Therese S. Barnes, Clerk

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

Date: September 8, 2008

Case No. S08C1556

KRAMER V. YOKELY ET AL.

COURT OF APPEALS CASE NOS.
A07A1977, A07A1978

The Supreme Court today denied the petition for certiorari.

All the Justices concur.

Therese S. Barnes, Clerk

FIRST DIVISION
RUFFIN, P.J.,
ANDREWS and BERNES, JJ.

NOTICE: Motions for reconsideration must be *physically received* in our clerk's office within ten days of the date of decision to be deemed timely filed. (Court of Appeals Rule 4 (b) and Rule 37 (b), February 21, 2008)
http://www.gaappeals.us/rules/

May 2, 2008

In the Court of Appeals of Georgia

A08A0103. KRAMER v. YOKELY et al.

BERNES, Judge.

In this legal malpractice action, plaintiff Edward E. Kramer appeals the trial courts grant of summary judgment to defendants Daryl Von Yokely and Kenneth Muhammad, attorneys who represented Kramer in an unsuccessful federal case brought pursuant to 42 USC § 1983. Kramer contends that the trial court erred by (1) considering and relying upon the district court order entered in the federal case; (2) ruling as a matter of law that Kramer had failed to show that his attorneys' alleged errors proximately caused the outcome in the federal case; and (3) ruling that the voluntary dismissal of certain defendants and abandonment of certain claims in the federal case would not support a malpractice claim as a matter of law. For the reasons discussed below, we affirm.

> A party is entitled to summary judgment if that party demonstrates that no genuine issue of material fact remains and he is entitled to judgment as a matter of law. The party who will not bear the burden of proof at trial need not affirmatively disprove the nonmoving party's case; instead, the burden on the moving party may be discharged by pointing out by reference to the affidavits, depositions and other documents in the record that there is an absence of evidence to support the nonmoving party's case. We review a grant of summary judgment de novo, considering the evidence, and all reasonable conclusions and inferences drawn from it, in the light most favorable to the nonmovant.

(Punctuation and footnotes ommitted.) *Gibson v. Halpern Enterprises,* 288 Ga. App. 790 (655 SE2d 624) (2007). See OCGA § 9-11-56 (c).

Viewed in this light, the record shows that the underlying federal case arose out of Kramer's pretrial detention in the Gwinnett County Detention Center ("GCDC") on pending child molestation charges. On August 25, 2000, Kramer was booked into the GCDC and informed detention officials that he suffered from several chronic medical conditions, including arthritis, psoriasis, sleep apnea, and asthma. As a result of his deteriorating medical condition, Kramer was released on bond on November 6, 2000. Nevertheless, on November 16, 2000, Kramer again was booked into the GCDC after

he allegedly violated the provisions of his bond. Because his medical condition continued to worsen, however, Kramer was released on January 24, 2001 to go on house arrest.

After his release, Kramer hired an attorney to pursue federal claims against the GCDC and detention center officials for allegedly failing to provide him with adequate medical care daring his confinement. Yokely and Muhammad later agreed to serve as co-counsel in the representation.

Kramer filed an action under 42 USC § 1983 in the United States District Court, Northern District of Georgia, against Gwinnett County, the sheriff of Gwinnett County, Prison Health Services, Inc. ("PHS"), and a PHS employee (the "Federal Defendants").[1] In his complaint as amended, Kramer alleged that the Federal Defendants were deliberately indifferent to his serious medical needs in violation of the United States Constitution by, among other things, failing to take him to several off-site doctor's appointments; not allowing him to use the GCDC's baptismal pool for bathing; being late in obtaining lab work; failing to replace bloody bedding and clothing; failing to properly assist him after he slipped and fell during a detention center drill; and prescribing a different psoriasis medication than what had been prescribed by his personal rheumatologist.

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[1] The complaint originally named three physicians and two other county officials as defendants, but these individuals were later voluntarily dismissed from the case. The complaint also originally alleged a claim for assault and battery under 18 USC § 242, a federal criminal statute, but that claim was later abandoned on summary judgment.

The Federal Defendants subsequently moved for summary judgment, which the district court granted in a published opinion. See *Kramer v. Gwinnett County*, 306 FSupp2d 1219 (N.D. Ga.), aff'd 116 Fed. Appx. 253 (2004). In the opinion, the district court made several rulings separate from the substantive merits of the summary judgment motions. First, the district court ruled that by failing to respond to many of the Federal Defendants' arguments, Kramer had abandoned any claims other than that detention center officials were deliberately indifferent to his serious medical needs. Id. at 1221 (I). Second, the district court concluded that Kramer had failed to comply with the local rules in responding to the Federal Defendants' statement of undisputed material facts, such that all of the Federal Defendants' "numbered facts [were] deemed admitted." Id. at 1221 (II). Third, the district court struck four of Kramer's exhibits submitted in opposition to summary judgment, including documents purporting to be Kramer's medical records from the GCDC for lack of authentication, although the court noted that those "very same documents" we re part of the record since they had been submitted and properly authenticated by the Federal Defendants as part of their own motions. Id. at 1224 (III) (B) (1). One of the remaining exhibits struck by the district court was the affidavit of Gerald Edward Blackford, Jr., whom Kramer had failed to disclose as a potential witness in his discovery responses. Id. at 1224-1225 (IIII) (B) (1).

Despite these deficiencies, the district court ruled that it would reach the merits and would fully consider the facts presented by Kramer in order to determine whether a genuine issue of material facts

existed justifying a jury trial on his constitutional claim of inadequate medical care. *Kramer*, 306 F.Supp.2d at 1221-1222 (II). In so ruling, the district court noted that the deliberate indifference standard applicable to pretrial detainees was governed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution, not the Eighth Amendment as argued by Kramer. Id. at 1226. The district court then proceeded to analyze the factual record in light of that standard, ultimately concluding that while Kramer may have claims sounding in negligence, none of the evidence would "support a finding that [the Federal] Defendants' actions rose to the constitutionally prescribed level of deliberate indifference." Id. at 1226-1227 (IV). Accordingly, the district court granted summary judgment in favor of the Federal Defendants. Id. at 1227-1228 (V).

The Court of Appeals for the Eleventh Circuit affirmed the district court in a per curiam decision. *Kramer* v *Gwinnett County*, 116 Fed. Appx. 253 (2004). Thereafter, Kramer filed the instant legal malpractice action against Yokely and Muhammad, two of the three attorneys who represented him in the federal case. Yokely and Muhammad moved for summary judgment based on a lack of proximate cause, contending that Kramer could not establish that but for his attorneys' alleged errors, the outcome of the federal case would have been different. The trial court granted the summary judgment motion. The trial court found that although Kramer's attorneys had been deficient in their representation, the federal district courts opinion made clear that "even if the attorneys had pled and prosecuted the case properly, no recovery

would be had." As such, the trial court concluded that Kramer "cannot show that he would been successful on the underlying claim" and thus "cannot prevail on his malpractice claim here." Kramer now appeals.

1. Although his enumeration of error is unclear, Kramer appears to contend that the trial court erred in considering and relying upon the federal district court's summary judgment order to support its conclusion that Kramer could not establish proximate cause. In this respect, Kramer contends that the federal district court's order was not properly certified and thus could not serve as competent evidence of what occurred in the federal case. We disagree.

Under OCCA § 24-1-4, trial court shall take judicial notice of a judicial opinion from a foreign jurisdiction if "published by authority . . . without the introduction of proof," so long as a party gives notice of its intent to rely upon the foreign law. See *P.G.L. & CC. Employees Credit Union v. Kimball,* 221 Ga. App. 108,109 (470 SE2d501) (1996); *Meeker v. Eufaula Bank & Trust,* 208 Ga.App. 702, 704(2) (431 SE2d 475) (1993). Here, the federal district court's order was published in the Federal Supplement Second and thus was "published by authority" See *Meeker,* 208 Ga. App. at 705(2) (decisions of Alabama Supreme Court published in the Southern Reporter were "published by authority"); *Swafford v. Globe American Casualty Co.,* 187 Ga. 730, 734 (1) (371 SE2d 180) (1988) (decision of Tennessee Court of Appeals published in Southwestern Reporter Second was "published by authority"). And, the very nature of the present

action – a legal malpractice suit predicated on the federal case –meant that all parties and the trial court necessarily had notice that the federal district court's opinion would be relied upon. See *Kimball*, 221 Ga.App. at 109; *Samay v. Som*, 213 Ga.App. 812, 815 (2)(c) (446 SE2d 230) (1994). It follows that the trial court was entitled to judicially recognize and rely upon the federal district court's order in granting summary judgment to Yokely and Muhammad.

2. Kramer next argues that the trial court erred in ruling as a matter of law that Kramer had failed to show that his attorneys' alleged errors were the proximate cause of damages to him. According to Kramer, he had viable legal malpractice claims because in the federal case his attorneys (a) failed to comply with the Local Rules for the Northern District of Georgia in responding to the Federal Defendants' statement of undisputed facts; (b) failed to have his medical records from the GCDC properly authenticated; (c) failed to list Gerald Edward Blackford, Jr. as a potential witness in discovery responses; (d) erroneously argued that the Eighth Amendment to the United States Constitution provided the applicable standard of liability; (e) failed to secure expert testimony to support Kramer's deliberate indifference claim; and (f) failed to submit the affidavit of a registered nurse who had evaluated Kramer.[2]

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[2] Kramer also contends that his attorneys erred by failing to submit the affidavits of David Foster and David Culpepper in opposition to summary judgment in the federal case. The uncontroverted evidence reflects, however, that Fosters affidavit was part of the summary judgment record before the federal district court. As to Culpepper's affidavit, Kramer has failed to supplement the record to include it, although he promised to do so in his appellate brief filed several months

To prevail on a legal malpractice claim, a client must prove that (1) he employed the defendant attorney; (2) the attorney failed to exercise ordinary care, skill and diligence; and (3) this failure was the proximate cause of damages to the client. To establish proximate cause, the client must show that but for the attorney's error, the out come would have been different; any lesser requirement would invite speculation and conjecture, The defendant attorney is entitled to summary judgment if he shows that there is an absence of proof adduced by the client on the issue of proximate cause.

(Footnote omitted.) *Millsaps v. Kaufold,* 288 Ga. App. 44, 44-45 (653 SE2d 344) (2007). Guided by these principles, we conclude that the trial court properly ruled that Kramer could not show that the element of proximate cause had been met as to any of his attorneys' alleged errors in the federal case.

(a) It is true, as Kramer asserts, that his attorneys failed to comply with the Local Rules for the Northern District of Georgia in responding to the Federal Defendants' statement of undisputed facts, leading the district court to rule that all of the Federal Defendants' numbered facts [were] deemed admitted." *Kramer,* 306 Fsupp2d at 1221 (II). Nevertheless, the district court expressly stated that

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Kramer has failed to supplement the record to include it, although he promised to do so in his appellate brief filed several months ago. "It is the primary responsibility of the appropriate parties and not this court to ensure that all documents relevant to the disposition of an appeal be duly filed with the clerk of this court prior to the issuance of our appellate decision." (Citation and punctuation omitted.) *Lott v. Arrington & Hollowell,* 258 Ga. App. 51, 53 (1) (572 SE2d 664) (2002). Consequently, we are precluded from reviewing Culpepper's affidavit and any argument made by Kramer that is predicated on it. Id. at 53-54 (1)

it would proceed to reach the merits and fully consider the facts presented by Kramer in determining whether to grant or deny summary judgment. Id. at 1221-1222 (II). Kramer therefore cannot establish proximate cause as a matter of law; even if his attorneys had complied with the local rules and properly responded to the Federal Defendants' statement of undisputed facts, it would not have changed the outcome of the federal case. See *Goodman v. Glover,* 247 Ga. App. 829, 830 (544 SE2d 214) (2001) (proximate cause cannot be shown when the court decided the case on the underlying merits and addressed the very issue "that [the plaintiff] claims his former defense counsel waived").

(b) Kramer likewise focuses on his attorneys' to have his medical records from the GCDC properly authenticated, which led the federal district court to strike his exhibits purportedly containing those documents. *Kramer,* 306 Fsupp2d at 1224 (III) (B) (1). Yet, the federal district court noted that the "very same documents" were part of the summary judgment record because they had been authenticated by the Federal Defendants and were submitted as part of their motions for summary judgment. Id. As such, even if Kramer's attorneys had ensured the proper authentication, of the medical records, it would have made no difference to the summary judgment record and thus would have had no impact on the federal district courts decision. Given that "the evidence and record... [show that] the result would have been the same" irrespective of the attorneys' alleged error, proximate cause could not be proven as a matter of law. *Alta Anesthesia Assoc. of Ga. v. Bouhan, William & Levy,* 268 Ga. App. 139, 143 (1) (601 SE2d 503) (2004).

(c) Additionally, Kramer emphasizes that his attorneys failed to list Blackford as a potential witness in discovery responses, which resulted in the federal district court striking Blackford's affidavit and refusing to consider it as part of Kramer's opposition to summary judgment. *Kramer*, 306 Fsupp2d at 1224-1225 (III) (B) (1). Blackford was a detainee at GCDC during the same period as Kramer, and his affidavit contains several allegations concerning how Kramer was treated during his confinement there. But, the allegations made by Blackford in his affidavit are the same as the allegations made by two other GCDC detainees in affidavits that were part of the summary judgment record before the federal district court. Hence, the allegations contained in Blackford's affidavit were cumulative of other evidence that had been submitted and was considered by the federal district court in ruling on the summary judgment motions, and so proximate cause again could not be established. See *Kidd v. Ga. Assoc. of Education*, 263 Ga. App. 171, 173-174 (587 SE2d 289) (2003) (plaintiff could not show proximate cause based on his attorney's alleged error in defending him at an administrative hearing, where the record demonstrated that the hearing board was aware of and had considered the same information that the attorney had allegedly failed to place before the board). Cf. Gordillo v. State, 255 Ga. App. 73, 77 (3) (b) (ii) (564 SE2d 486) (2002) (ineffective assistance claim failed because no prejudice to the outcome of the proceedings could be shown based on defense counsel's failure to introduce evidence "simply cumulative of other evidence properly admitted").

(d) Kramer further points out that his

attorneys erroneously argued to the federal district court that the Eighth Amendment to the United States Constitution provided the applicable standard of liability for his claim of inadequate medical care. *Kramer,* 306 FSupp2d at 1226 (IV). The Due Process Clause of the Fourteenth Amendment, not the Eighth Amendment, applies to pretrial detainees. See *Hamm v. DeKalb County*, 774 F2d 1567, 1572 (III) (4) (1) (11th Cir. 1985). Significantly, however, "the minimum standard allowed by the due process clause is the same as that allowed by the eighth amendment for convicted persons." Id. at 1574 (III) (a) (1), Recognizing this point, the federal district court proceeded to consider Kramer's medical treatment claims under the deliberate indifference standard, despite his attorneys' mistake in stating that the claims arose under the Eighth Amendment rather than the Due Process Clause. *Kramer,* 306 FSupp2d at 1226 (IV). Accordingly, Kramer cannot show that his attorneys' error in failing to properly state which constitutional provision applied made any difference to the outcome of the federal case.

(e) Kramer also focuses on his attorneys' alleged failure to secure expert testimony to support his deliberate indifference claim in the federal case. In support of his contention, Kramer submitted the affidavit of Dr. Glenn R. Parris, his personal rheumatologist. Kramer claims that an affidavit from Parris should have been submitted by his attorneys in opposition to summary judgment and would have changed the federal district court's ruling.[3] We disagree because the opinions and

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[3] Kramer separately argues that his attorneys erred by submitting the affidavit of another expert, Dr. Steven Freedman, which described Kramer's medical condition, without going further and having Dr. Freedman express an

impressions of Dr. Parris – reflected in multiple documents contained in Kramer's GCDC medical records and in Dr Parris' transcribed testimony at a November 6, 2000 bond heating – are part of the summary judgment record and thus were considered by the federal district court. Kramer cannot show that the submission of an affidavit by Dr. Parris containing those same opinions and impressions would have affected the outcome in the federal case, and, therefore, cannot prove proximate cause. *See Kidd,* 263 Ga. App. at 173-174.

(f) Finally, Kramer emphasizes that his attorneys failed to submit in the federal case the affidavit of Sherry Henry, a registered nurse who had evaluated Kramer while he was confined at the GCDC. In her affidavit, Henry describes Kramer's deteriorating medical condition during his confinement and goes on to opine that detention center officials breached the standard of care in failing to provide Kramer proper medical treatment so as to prevent the deterioration in his condition.[4] The same information about Kramer's deteriorating medical condition, however, was contained in his GCDC medical records, the affidavits of the two detainees discussed in Division 2(c), and the transcript of the November 6, 2000 bond hearing, all of which were part of the summary judgment record before the federal district court. Since the district court was aware of the same information contained

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opinion as to the adequacy of Kramer's treatment while confined in the GCDC. But, Kramer has failed to provide any citations to the record or point to any competent evidence reflecting that Dr. Freedman would have been willing to provide an expert opinion on the adequacy of Kramer's treatment.

[4] Yokely and Muhammad do not challenge Henry's qualifications to render this expert opinion.

in Henry's affidavit at the time the court ruled on the summary judgment motions, the affidavit would not have changed the outcome. Furthermore, Henry's opinion that detention officials breached the standard of care in their handling of Kramer's medical condition likewise would not have changed the outcome, since the district court expressly ruled in its opinion that the evidence presented by Kramer might support a claim of negligence or medical malpractice, but did not rise to the level of deliberate indifference. See *Kramer,* 306 FSupp2d at 1227 (IV). See also *Farrow v. West,* 320 F3d 1235, 1243 (III) (A) (11th Cir. 2003) (noting that "[t]he inadvertent or negligent failure to provide medical care' does not rise to the level of deliberate indifference so as to support a constitutional claim). It follows that Kramer cannot establish proximate cause based upon this alleged error.

3. In his final enumeration of error, Kramer makes the blanket assertion that "[w]ether [his attorneys] dismissed defendants in the federal cause of action or decided not to pursue causes of action with or without [his] consent is an issue for the jury." Kramer does not elaborate further on what specific defendants or claims should have been pursued in the federal case, or otherwise address how the alleged error proximately caused him any damage. "Pursuant to Court of Appeals Rule 25(a)(3), an appellant must support enumerations of error with argument and citations of authority, and mere conclusory statements are not the type of meaningful argument contemplated by Rule 25 (a) (3)." (Citation and punctuation omitted.) *Jones v. State,* 289 Ga. App. 219, 221 (1), n. 1 (656 SE2d 556) (2008). See *All Fleet Refinishing v. West Ga. Nat. Bank,* 280 Ga.

App. 676, n. 2 (634 SE2d 802) (2006); *College Park v. Sheraton Savannah Corp.*, 235 Ga. App. 561, 564 (6) (509 SE2d 371) (1998). Accordingly, Kramer's assertion of error is deemed abandoned. Id. See Court of Appeals Rule 25(c) (2).

Judgment affirmed. Ruffin, P.J. and Andrews, J., concur.

IN THE SUPERIOR COURT OF FULTON COUNTY
ATLANTA JUDICIAL CIRCUIT
STATE OF GEORGIA

EDWARD E. KRAMER, Plaintiff, FILE v. DARYL VON YOKELY and KENNETH MUHAMMAD, Defendants.	CIVIL ACTION NO. 2006CV113356

ORDER

The above-styled case comes before the Court on the Defendant's Motion for Summary Judgment. Upon consideration, same is hereby GRANTED.

"Summary judgment is proper when there is no genuine issue of material fact and the undisputed facts, taken in the light most favorable to the nonmoving party, warrant judgment as a matter of law in favor of the moving party." Arkwright v. Taulbee, 248 Ga. App. 219, 220, 546 SE2d 335 (2001).

So viewed, the record shows that the Plaintiff suffers from the skin conditions of psoriasis and psoriatic arthritis. He began to experience a flare-up

of these conditions shortly before his August 25, 2000 arrest and placement in the Gwinnett County Detention Center. He sued Gwinnett County, alleging that its officials were deliberately indifferent to his medical needs as pertains to his skin conditions, and for neck and back injuries sustained when he fell at the detention center. He lost that case on summary judgment. The federal court's order was lengthy, containing a thorough discussion of the shortcomings of the Plaintiffs attorneys, as well as a discussion of the merits of the Plaintiff's case both as alleged and as they should have been alleged.

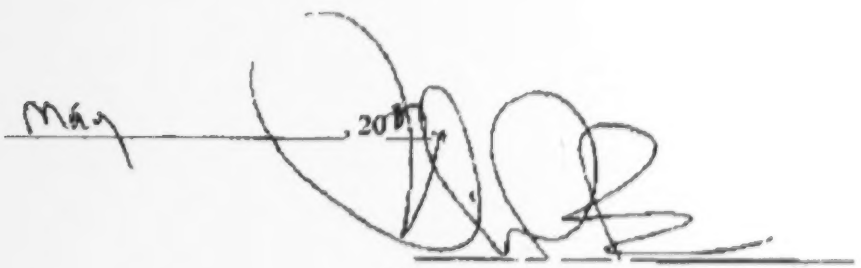
The Plaintiff is now suing 2 of his 3 former attorneys for malpractice. Those attorneys have moved for summary judgment.

"The elements of an action for legal malpractice consist of employment of an attorney; failure of the attorney to exercise ordinary care, skill and diligence; and damages proximately caused by that failure. Tante v. Herring, 264 Ga. 694 (1994). The client carries the burden of proof. Paul v. Smith, Gambrell & Russell, 267 Ga. App. 107, 108, 599 SF24 206 (2004).

The Defendants were woefully deficient in their representation of the Plaintiff in the federal lawsuit. As pointed out by the judge. their shortcomings resulted in the loss of the Plaintiff's case as a matter of law. However and most importantly, the federal court did not end its analysis here. The court continued its analysis and found that, even if the attorneys had pled and prosecuted the case properly, no recovery would be

had. Thus, the Plaintiff cannot satisfy the final element of his malpractice claim: damages. To be sure, he did not receive perfect representation from his attorneys. Perfect representation, though, would still have ended in a lost case. If the Plaintiff cannot show that he would have been successful on the underlying claim, he cannot prevail on his malpractice claim here.

The Motion for Summary judgment is GRANTED on the merits. The Defendants' request for attorney fees however, is DENIED in the strongest possible terms.



The Honorable Christopher S. Brasher
Fulton County Superior Court
Atlanta Judicial Circuit

cc:
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Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

October 3, 2005

Mr. Edward E. Kramer
2480 Honeycomb Way
Duluth, Georgia 30096

Re: Edward Eliot Kramer
v. Gwinnett County, Georgia, et al.
No. 04-1678

Dear Mr. Kramer:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

s/William K. Suter, Clerk
William K. Suter, Clerk

Filed
U.S. COURT OF
APPEALS
ELEVENTH
CIRCUIT
Aug 23, 2004

THOMAS K. KAHN
CLERK

United States Court of Appeals
For the Eleventh Circuit

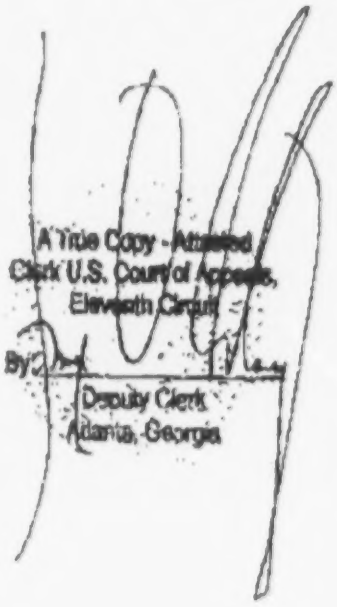
No. 04-11474

District Court Docket No
02-02124-CV-ODE-1

EDWARD ELIOT KRAMER,

Plaintiff-Appellant

GWINNETT COUNTY, GEORGIA, and unknown and unnamed employees, contractors, and agents of Gwinnett County, R. L. BUTCH CONWAY, PRISON HEALTH SERVICES, INC., and unknown and unnamed employees, Contractors, and agents of Prison



Health Services, Inc.,
GWINNETT COUNTY SHERIFF'S DEPUTIES,
unknown and unnamed, DWANA GEPHART,

Defendants-Appellees,

J.J. HOGAN, CARL SIMMS,
ANTHONY SCHEID, M.D.,
MANUEL M. FAJARDO, M.D.,
MAREK MAJOCH M.D.,

Defendants.

Appeal from the United States District Court
for the Northern District of Georgia

J U D G M E N T

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: August 23, 2004
For the Court: Thomas K. Kahn, Clerk
By: Jackson, Jarvis

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-11474
Non-Argument Calendar

D.C. Docket No. 02-02124-CV-ODE-1

EDWARD ELIOT KRAMER,

Plaintiff-Appellant,

versus

GWINNETT COUNTY, GEORGIA, and
unknown and unnamed employees, contractors,
and agents of Gwinnett County,
R.L. BUTCH CONWAY, et al.,

Defendants-Appellees,

Appeal from the United States District Court
for the Northern District of Georgia

(AUGUST 23, 2004)

Before ANDERSON, WILSON and COX, Circuit Judges.

PER CURIAM:

Plaintiff Edward Eliot Kramer appeals the district court's summary judgment for Defendants Gwinnett County Sheriff R. L. 'Butch" Conway, Prison Health Services, Inc., and Dwana Gebhardt, in Plaintiff's 42 U.S.C. § 1983 action alleging deliberate indifference to his serious medical needs while an inmate in the Gwinnett County jail. The district court's order granting summary judgment is reported at *Kramer v. Gwinnett County, Ga.*, 306 F. Supp. 2d 1219 (M.D. Ga. 2004). We affirm.

On appeal, Plaintiff contends that the district court cited in two ways: (1) by striking as unauthenticated three of the exhibits attached to Plaintiff's response to the Defendants' motion for summary judgment, and 2) by concluding that the undisputed evidence showed that the Defendants were not deliberately indifferent to Plaintiff's serious medical needs. We discuss these in turn.

We review for abuse of discretion whether the district court erred in striking the exhibits; we will reverse only if the court's ruling was erroneous and created a "substantial prejudicial effect." *Club Car, Inc. v. Club Car (Quebec) Import, Inc.*, 362 F.3d 775, 780 (11th Cir. 2004) (citations omitted). The district court struck three of Plaintiffs exhibits, reasoning that they were neither sworn to nor authenticated, as required by Fed. R. Civ. P. 56. The first of these exhibits, a group of photographs which Plaintiff contends were of his skin condition, was not authenticated by anyone: in the deposition passage Plaintiff cites for authentication, Plaintiff's lawyer expressly disavows authentication. Thus, the district court did not abuse its discretion in striking them as unauthenticated. The second two exhibits, papers

which Plaintiff contends were his jail medical records, were not authenticated by the Plaintiff; if they are indeed his medical records, then they were made part of the record by the Defendants, and were in the summary judgment record. Thus, the Plaintiff suffered no prejudice by the district court's refusing to impute the Defendants' earlier authentication of their copy of the records to the Plaintiffs copy.

We review de novo the district court's grant of summary judgment, applying the same familiar standards as the district court. *Hallum v. Provident Life & Acc. Ins. Co.*, 326 F.3d 1374, 1375-76 n.1 (11th Cir. 2003). Plaintiff points out four instances in which he contends that the Defendants' provided him constitutionally inadequate medical care: (1) failing to transport him to a follow-up dermatology appointment on September 30, 2000, (2) discontinuing his prescription for Arava, (3) refusing to allow him to take medicated baths, and (4) failing to provide him adequate bedding. He contends that because these instances show constitutionally inadequate care, the district court erred in entering summary judgment for the Defendants.

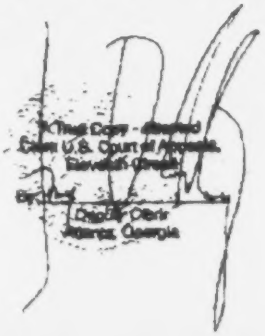
First, Plaintiff fails to point to any evidence that any of the Defendants knew of his September 30, 2000, follow-up dermatology appointment, prior to the appointment. Indeed, the evidence he points to shows that he told them of this appointment only after he had missed it. Thus, his missing the appointment could not be grounds for a deliberate indifference claim. *See Furrow v. West*, 320 F.3d 1235, 1245(11th Cir. 2003) ("[A] prison official cannot be found deliberately indifferent . . . unless the official knows of and disregards an excessive risk

to inmate health . . .") (internal quotation marks and emphasis omitted).

Second, though it is undisputed that Plaintiff's prescription for Arava, an oral medication for Psoriasis, was discontinued, it is also undisputed that Plaintiff was given a comparable alternative medication regimen which he does not contend was medically inadequate. Denying Plaintiff his drug of choice is not a violation of his constitutional rights. *See Hamm v. Dekalb County*, 774 F.2d. 1567, 1575 (11th Cir. 1985) (This evidence shows that Hamm received significant medical care while at the jail. Although Hamm may have desired different modes of treatment, the care the jail provided did not amount to deliberate indifference.").

Third, though it is undisputed that the Plaintiff was not allowed to take baths in the jail's baptismal pool, it is also undisputed that the jail's medical personnel prescribed and allowed the alternative treatment of showering with medicated soap. Again, though this may have not been Plaintiff's preferred treatment, there is no evidence that it was a constitutionally inadequate substitute.

Fourth, Plaintiff contends for the first time on appeal that the Defendants were deliberately indifferent to Plaintiff's serious medical needs by denying him certain bedding. Because this contention was raised for the first time on appeal, we decline to consider it. *See Technical Coating Applicators, Inc. v. U.S. Fidelity and Guar. Co.*, 157 F.3d 843,846(11th Cir. 1998).
AFFIRMED.



IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVSION

EDWARD ELIOT KRAMER,

Plaintiff,

v. CIVIL ACTION NO.
1:02-CV-2124-ODE

GWINNETT COUNTY, GEORGIA; R.L. "BUTCH" CONWAY, PRISON HEALTH SERVICES, INC.; AND DWANAN GEBHARDT,

Defendants

ORDER

This civil matter, alleging deprivation of Plaintiffs constitutional rights in violation of 42 U.S.C. § 1983, is presently before the Court on Plaintiff's opposed motions for oral argument on Defendants' motions for summary judgment [## 58, 59] Defendants Gwinnett County and Conway's opposed notion to strike [#55], Defendants Prison Health Services and Gebhardt's opposed motion to strike [#65], Defendant Conways opposed motion for leave to file supplemental brief [#72], Defendants Prison Health Services and Gebhardts opposed motion for summary judgment [#43] and Defendants Gwinnett County and Conway's opposed motion for summary judgment (#46].

I. Background

Defendant Prison Health Services, Inc. ("PHS") contracts with Defendant Gwinnett County, Georgia to provide medical care to inmates housed at the Gwinnett County Detention Center ("GCDC"). Defendant Gebhardt is PHS's on—site Health Services Administrator at the GCDC and is responsible for coordination of medical services provided. Defendant Conway is the Sheriff of Gwinnett County, Georgia, and is sued in his official capacity.

Plaintiff was an inmate at the GCDC from August 25, 2000 until November 6, 2000, and then again from November 16, 2000 until January 24, 2001. On July 11, 2002, Plaintiff brought suit under 42 U.S.C. 1953 and 18 U.S.C. § 242 against the current Defendants and five subsequently dismissed individuals to redress certain wrongs which were alleged to have occurred during Plaintiff's incarceration at the GCDC. On August 2, 2002, Plaintiff filed an amended complaint that, at seventy—four pages and 209 paragraphs, was substantially similar to the original complaint filed on July 21. In response to two defense actions for a more definite statement, this Court found Plaintiff's amended complaint stated claims for violation of at least three constitutional rights under Section 1983 and attempted to state a claim for assault and battery under a criminal statute, 18 U.S.C. § 242. (Order, October 3, 2002 at 4.)

By stipulation of the parties, the five aforementioned individual defendants were dismissed pursuant to Fed. R. Civ. P. 41(a)(i)(ii) on

January 5, 2002. Subsequent to this dismissal, the two pending defense motions for summary judgment were filed seeking dismissal of all of Plaintiff's claims. Plaintiff's responses to Defendants' motions for summary judgment were for the most part wholly unresponsive to Defendants' arguments, and contained only one heading labeled "deliberate indifference," which is a reference to Plaintiff's Section 1983 claim for deliberate indifference to Plaintiff's serious medical needs.

Although Plaintiff's responses make passing reference to an Eighth Amendment cruel and unusual punishment claim, Plaintiff fails to tie said claim to any Defendant currently before the Court).[5]

Local Rule 7.1B provides that failure to file a response to a party's motion "shall indicate that there is no opposition to the motion." ND. Ga. St. 7.18. Rule 7.15 requires not just that a party generally "respond" to a motion but mandates that a party respond to each portion of a motion. See Witter v. Delta Airlines, Inc., 966 F. Supp. 1193, 1200 (ND. Ca. 1997). Consequently, a party's failure to respond to any portion or claim in a motion indicates such portion, claim or defense is unopposed. Welch v. Delta Airlines, Inc., 978 7. Supp. 1133, 1142 ND. Ga. 1997) ("[U]nder Local Court Rule 7.1 of the United States District Court for the Northern District of Georgia, factual and legal claims to which there is no response should be treated as unopposed."). Having failed to respond to many of Defendants' arguments

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[5] Furthermore, the Eighth Amendment is inapplicable to pretrial detainees such as Plaintiff. Hamm v. Dekalb County, 774 F.2d 1567, 1572 (11th Cir. 1935). Any claim related to Plaintiff's treatment would have to be brought under Fourteenth Amendment Due Process. Id.

and having defended only his Section 1983 claim for deliberate indifference to a serious medical need, Plaintiff is found to have abandoned all other asserted claims. Accordingly, the only claim remaining on summary judgment is Plaintiff's claim for constitutionally inadequate medical care.[6]

II. Facts

For the most part, the Court draws the facts from Defendants' statements of undisputed material facts. In accordance with Local Rule 56.1B(1) both sets of Defendants, with their motions for summary judgment, filed a separate, numbered statement of undisputed material facts. Local Rule 56.1B(2) provides,

> The respondent to a motion for summary judgment shall attach to the response a separate and concise statement of material facts, numbered separately to which the respondent contends there exists a genuine issue to be tried. Response should be made to each of the movant's numbered material facts. All material facts contained in the moving party's statement which are not specifically controverted by the respondent in respondent's statement shall be deemed to have been admitted.

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[6] This finding is in keeping with Plaintiff's counsel's statement during the July 17, 2003 motion hearing that the only issue in this action is whether the medical treatment provided to Plaintiff while incarcerated constituted deliberate indifference to a serious medical need.

N.D. Ca. R 569(2) (emphasis added). Plaintiff—respondent failed to comply with this rule, and instead, filed a pleading which stated, "The facts in this case are voluminous. Plaintiff incorporates the exhaustive facts alleged in his Complaint and in the Facts portion of his brief as if fully stated herein." (Plaintiff's Statement of Theory of Recovery and Material Facts As To Which There Are Genuine Issues at 2.) Thus, Plaintiff has failed to oppose any of Defendants' material facts, and all of Defendants' numbered facts are deemed admitted. See Jackson v. City of Stone Mountain, 222 F. Supp. 2d 1337, 1241 (ND. Ga. 2002). Nevertheless, the court must still view all evidence and inferences of fact in the light most favorable to Plaintiff. Adickes v. S.H. Kress & Co., 390 U.S. 144, 157 (1970). Accordingly, the Court has referenced the facts section of Plaintiff's response in an effort to determine the contentions put forth by Plaintiff.

The facts as are relevant to Plaintiff's claim of deliberate indifference are as follows. Plaintiff was arrested and booked into the GCDC on August 2~, 2000, on two counts of aqgravated child molestation. Upon being booked, Plaintiff was medically screened by a PHS nurse. During said screening Plaintiff indicated that he suffered from various medical problems including psoriasis, psoriatic arthritis, poor circulation, sleep apnea and asthma. Plaintiff also informed the nurse that he utilized prednisone (a steroid), aspirin, and a topical steroidal cream on a daily basis. Plaintiff has suffered from psoriasis and related conditions for all of his adult life. With treatment, Plaintiff has historically been able to manage these conditions into remission. Prior to his

booking into the GCDC, however, Plaintiff had experienced a flare-up of his psoriasis.

On the day following his bookinq, August 26, 2003, Plaintiff filed a medical request with the GCDC noting that his psoriasis lesions had begun to bleed and that he was in need of his prednisone to prevent arthritic swelling in his joints. That same day, plaintiff's prednisone medication was delivered to the jail, and administration of the medication began. On August 29, Plaintiff's steroidal cream was delivered; Plaintiff was allowed to keep this medicine in his cell for use as needed.

From early-September until November 6, 2003, Plaintiff's condition steadily worsened with continued outbreaks of psoriasis, bleeding lesions and joint swelling. During this period, Plaintiff was seen by PHS physicians on five occasions and attended to by PBS nurses numerous times. In an attempt to better monitor his condition, Plaintiff was placed in the GCDC medical unit for five days to allow for constant observation by the PHS nursing staff. At the recommendation of a PHS physician, Plaintiff was taken to an off—site dermatologist where he was prescribed another steroidal ointment and other additional medication. In a further effort to assuage Plaintiff's worsening condition, Plaintiff was twice transported to his own rheumatologist who prescribed another treatment option and ordered an MRI to evaluate neck pain Plaintiff obtained through a fall at the jail. In accordance with his rheumatologist's orders, Plaintiff was taken to Emory Eastside Medical Center for an MRI.

Plaintiff had originally been denied bond, but based on his continued medical ailments, a second bond hearing was held before Gwinnett Superior Court Judge Debra Turner on November 6, 2000. At the hearing, the Court received testimony from Plaintiff's rheumatologist and Defendant Gebhardt. Plaintiff's doctor noted the condition of Plaintiff's psoriasis had deteriorated since his incarceration which in turn was causing an increase in Plaintiff's psoriatic arthritis and had resulted in a new lesion that was capable of causing severe spinal injury. It was also revealed that PHS inadvertently allowed Plaintiff to miss a follow—up appointment with the off—site dermatologist, and PHS had yet to perform blood work ordered three weeks prior to the hearing. These findings and the GCDC's lack of bathtubs, warm baths represent an important part of the treatment of psoriasis, led the Judge to conclude that it was in Plaintiff's best interest to return home to care for himself. Accordingly, Plaintiff was granted bond. Plaintiff's at-home care, however did not last for an extended period. On November 16, 2000, Plaintiff was again booked in the GCDC for allegedly violating the provisions of his bond. The treatments Plaintiff had previously been receiving were resumed within a day.

On November 27, 2000, Plaintiff was seen by a PHS physician. On the following day, Plaintiff was seen by the off-site dermatologist who had treated Plaintiff during his prior period of incarceration. The dermatologist recommended tri-weekly PUVA light treatments with Plaintiff's regular dermatologist in an effort to combat plaintiff's psoriasis. Said treatments began on December 6, 2000 and

continued every Monday, Wednesday, and Friday for the balance of Plaintiff's incarceration.

On December 1, 2000, Plaintiff's neck was allegedly injured in a security drill at the GCDC.[7] In response to his complaints, after noting no signs of external injury, PHS nurses treated Plaintiff with Tylenol and Motrin. A follow-up examination by PHS physician led to a ten-day course of Motrin combined with a muscle relaxer.

In mid-December 2000, on the basis of Plaintiffs complaints that PHS allowed him to miss around twenty percent of his outside medical appointments and his general perception of inadequate medical care, Plaintiff's criminal attorneys requested that Judge Turner allow Plaintiff to schedule his own medical treatment. On December 18, 2000, Plaintiff's request was granted. The judge's order left PHS with little involvement in Plaintiff's medical care beyond dispensation of his medications.

On December 27, 2000, Plaintiff filled out an inmate request complaining that he was not receiving his breakfast at the appropriate time for his medication schedule. Defendant Gebhardt responded in writing promising she would meet with GCDC administration on January 2, 2001. At the January 2 meeting Gebhardt was assured the problem would he resolved. On January 7, Gebhardt prepared a memorandum to GCDC staff outlining when Plaintiff was to be fed in accordance with the requirements of his PUVA light treatments. On

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[7] This incident gave rise to Plaintiff's assault claim which the court has deemed to have been abandoned.

January 24, 2001, Plaintiff was released from the GCDC to go on house arrest.

III. Motions Relating to Summary Judgment

Subsequent to the filing of Defendants' motions for summary judgment, Plaintiff moved for oral argument on both motions for summary judgment, Defendants moved to strike both of Plaintiff's responses and specified exhibits attached thereto, and Defendant Conway moved for leave to file a supplemental brief. Before turning to the question of summnary judgment, the Court will address these related motions.

A. Plaintiff's Motions for Oral Argument

Plaintiff moved for oral argument with respect to both defense motions for summary judgment by filing two one-sentence motions simply requesting a hearing. By way of reply to Defendants' joint objection to his motions for oral argument, Plaintiff supported his request for a hearing by noting that six motions have been filed relating to summary judgment, and by further noting that Defendants elicited over three days of deposition testimony from Plaintiff, thereby creating an extensive factual record.

Local Rule 7.1E states, "Motions will be decided by the Court without oral hearing, unless a hearing is ordered by the Court." N.D. Ga. R. 7.1E. In the current matter, all necessary evidence is before the Court, and the Court is unpersuaded by Plaintiff's assertions regarding the need for oral

argument, Consequently, Plaintiff's motions for oral argument are denied.

B. Defendants' Motions to Strike

Defendants Gwinnett County and Conway and Defendants PHS and Gebhardt each moved to strike Plaintiff's responses to their respective motions for summary judgment. In addition, Defendants Gwinnett County and Conway moved to strike four exhibits attached to Plaintiff's response. Defendants PHS and Gebhardt moved to strike one exhibit attached to Plaintiff's response.

1. Defendants Gwinnett County and Conway's Motion to Strike

Defendants move to strike Plaintiff's thirty-nine page response to their motion for summary judgment on the basis of its grossly exceeding the twenty-five page limit set by Local Rule 7.1D. Defendants ask this Court to exercise its discretion under Local Rule 7.1F and decline to consider Plaintiff's response. Plaintiff concedes failure to comply with the Rule's page limitation and failure to seek leave of court for such noncompliance. Plaintiff attempts to justify his noncompliance based on an alleged voluminous factual record in this case.

The court finds Plaintiff's justification wholly unpersuasive. The Local Rules are mandatory and are in place to ensure a fair and just pretrial process. If the rather limited factual record in this case warranted departure from the Rules, the cases to which the Rules applied would be rare indeed. In an effort to decide this case on its merits, however the

Court declines to exercise its discretion to disregard Plaintiff's response.

Defendants also move to strike Exhibits 1, 2 and 3 attached to Plaintiffs response on the basis that said exhibits are not sworn, certified, authenticated or otherwise presented in compliance with Fed. R. Civ. P. 56(e). Plaintiff counters that Exhibit 1, a set of undated, unidentified photographs of various human appendages presumably affected by psoriasis, was authenticated by PHS physician Mark Majoch, M.D., at deposition. Plaintiff's counsel, however, disavowed any attempt at authentication of the photographs at Majoch's deposition, and Plaintiff offers no other method of authentication. Exhibits 2 and 3 are collections of unidentified documents. Plaintiff urges that the documents should not be stricken because Defendants authenticated these very same documents for use in their motion for summary judgment. Plaintiff offers no support for a respondent's ability to rely on cross—authentication. Because Exhibits 1, 2, and 3 were not properly authenticated or verified as required by Fed. R. Civ. P. 56(e), said exhibits are stricken from Plaintiff's response. See Lugue v. Hercules, Inc., 12 F. Supp. 2d 1351, 1355-56 (S.D. Ga. 1997).

Finally, Defendants move to strike Exhibit 4, the affidavit of Gerald Edward Blackford, Jr. Defendants assert Mr. Blackford's affidavit should be stricken because he was not identified as a witness in Plaintiff's response to Defendants' discovery requests or in Plaintiff's initial disclosures. Fed. R. Civ. P. 26(a)(1)(A) requires a party to provide the opposing party with the name, address and telephone number of each individual likely to have

discoverable information which may be used to support the disclosing party's claims or defenses. Mr. Blackford was an inmate at the GCDC during Plaintiff's incarceration at the facility. Plaintiff's counsel attempts to excuse the failure to disclose Mr. Blackford based on the large number of inmates at the GCDC who may possess relevant information and Defendants' superior position to determine the identity of such inmates. This assertion alone is not sufficient to obviate counsel's duty to determine and disclose with due diligence what evidence supports Plaintiff's causes of action. Accordingly, Exhibit 4 is stricken.

For the reasons set forth above, Defendants Gwinnett County and Conway's motion to strike is denied in part, granted in part.

2. Defendants PHS and Gebhardt's Motion to Strike

Defendants move to strike both Plaintiff's response to their motion for summary judgment and the affidavit of Mr. Gerald Edward Blackford, Jr. Defendants' arguments for striking said brief and affidavit are similar to those put forth in Defendants Gwinnett County and Conway's motion to strike. In keeping with its ruling on the prior motion to strike, the Court denies Defendants' motion to the extent it seeks to strike Plaintiff's response, and grants Defendants' motion to the extent it seeks to strike Mr. Blackford's affidavit.

C. Defendant Conway's Motion for Leave To File Supplemental Brief

Defendant Conway seeks leave to file a supplemental brief in support of his motion for summary judgment. Local Rule 56.1A provides that supplemental briefs and materials shall not be considered on a motion for summary judgment except upon court order. N.D. Ga. P. 56.1A. Because the Court has before it the necessary and relevant evidence needed to rule on the issues presented for summary judgment, Defendant Conway's motion to file a supplemental brief is denied.

IV. Summary Judgment

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). To prevail on the motion for summary judgment, Defendants must show that the evidence is insufficient to establish an essential element or Plaintiff's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). In ruling on Defendants' motions for summary judgment, the Court must view the evidence in a light most favorable to Plaintiff. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). If Defendants make a sufficient showing, then Plaintiff "must come forward with specific facts showing that there is a genuine issue for trial.'" Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)).

As noted above, Plaintiff charges Defendants with deliberate indifference to his serious medical needs. In support of his claim, Plaintiff attacks the method and quality of the treatment of his psoriasis and related conditions while incarcerated at the GCDC. Plaintiff asserts that his psoriasis lesions bled through both clothing and bed sheets without timely replacement of either. Plaintiff also complains of his inability to take warm baths, a treatment recommended by all dermatologists who saw him. Although the GCDC was not equipped with bathtubs, Plaintiff alleges that he should have been allowed to use the available baptismal pool for this purpose. Furthermore, Plaintiff points to a ten—day period between his arrival at the GCDC and his initial examination by a PHS physician as evidence of improper care. Upon his initial examination by the physician, who noted Plaintiff's was the worst case of psoriasis he had encountered, Plaintiff maintains he should have been immediately sent to a specialist.

Other evidence Plaintiff relies upon in support of his claim includes the lack of notes in Plaintiff's PHS medical files concerning his arthritic condition and joint swelling. Likewise, Plaintiff takes issue with PHS physicians' treatment of his neck pain as a muscular problem without having looked at Plaintiff's MRI, and despite their knowledge of his prior spinal condition. Plaintiff also notes PHS failed to secure his attendance at a follow-up appointment with the off-site dermatologist Plaintiff was originally referred to, and PHS was tardy in its completion of lab work ordered by Plaintiffs rheumatologist.

Plaintiff predicates his 42 U.S.C. § 1983 claim for deliberate indifference on violation of his Eighth Amendment right to be free from "the unnecessary and wanton infliction of pain." Estelle v. Gamble, 429 U.S. 97, 104 (1976). The Eighth Amendment, however, only protects individuals incarcerated subsequent to and because of a lawful conviction of a crime. Hamm v. Dekalb County, 774 F.2d 1567, 1572 (11th Cir. 1985). Conditions of confinement imposed on pretrial detainees such as Plaintiff are governed by the Fourteenth Amendment Due Process Clause. Id. Nevertheless, for purposes of the Court's analysis, "the minimum standard allowed by the due process clause is the same as that allowed by the eighth amendment for convicted persons." Id. at 1574. Therefore, the Court will make use of the Eighth Amendment standard in analyzing Plaintiff's claim.

Deliberate indifference to an inmate's serious medical needs violates the Eighth Amendment proscription against "unnecessary and wanton infliction of pain." Estelle 429 U.S. at 104. "To show that a prison official acted with deliberate indifference to serious medical needs, a plaintiff must satisfy both an objective and a subjective inquiry." Farrow v. West, 320 F. 3d 1335, 1243 (11th Cir. 2003). A plaintiff must initially provide evidence of an objectively serious medical need. Id. Next, a plaintiff must prove that the prison official acted with "deliberate indifference" to the serious medical need. Id. Assuming without deciding that Plaintiff's psoriasis and related conditions represented a serious medical need, the Court finds Defendants did not act with deliberate indifference to such a need.

Deliberate indifference requires more than a finding of mere negligence. Estelle 429 U.S. at 106. Likewise, "[m]edical malpractice does not become a Constitutional violation merely because the victim is a prisoner." The United States Court of Appeals for the Eleventh Circuit has characterized deliberate indifference as follows,

> '[A]n official acts with deliberate indifference when he knows that an inmate is in serous need of medical care, but he fails or refuses to obtain medical treatment for the inmate. Alternatively, '[e]ven where medical care is ultimately provided, a prison official may nonetheless act with deliberate indifference by delaying the treatment of serious medical needs, even for a period of hours, though the reason for the delay and the nature of the medical need is relevant in determining what type of delay is constitutionally intolerable.' For example, a defendant who delays necessary treatment for non—medical reasons may exhibit deliberate indifference.

Farrow, 320 F.3d at 1246 (citations omitted).

In the case at bar, it is clear that Plaintiff's condition greatly deteriorated from the time of his arrival at the GCDC until his release. It is also clear that Defendants had a terribly difficult time treating Plaintiffs worsening condition. The evidence, however, does not support a finding that Defendants' actions rose to the constitutionally proscribed level of

deliberate indifference On the contrary, Plaintiff was seen by PHS physicians on seven occasions and by PHS nurses at least fifteen times in just under five months of confinement Included in plaintiff's treatment was a five-day stay in the GCDC medical unit for constant observation by medical staff. In addition to Plaintiff's treatment at the GCDC, Plaintiff was transported to off-site specialists on over twenty occasions during this time. Included in these specialist visits were consultations with Plaintiff's own rheumatologist and dermatologist, and beginning in December 2000, tri-weekly PUVA light treatments.

There is no evidence that the missed appointments (Plaintiff estimates he was taken to only around eighty percent of his scheduled appointments) and tardy lab work of which Plaintiff complains were the result of anything more than negligence. Furthermore, many of Plaintiff's specific complaints relate to the quality of care he received rather than to the lack of care. The absence of notes in Plaintiff's PHS medical files relating to Plaintiff's arthritis and PHS's treatment of Plaintiff's neck and back pain as a muscular condition rather than spinal injury both sound more in the nature of medical malpractice rather than conscious disregard or deliberate indifference to a known medical need. In the same vein, Plaintiff's allegation that he should have been allowed bathing tine in the GDCD baptismal pool rather than the PHS physician-prescribed daily showering with Aveeno relates to modes of treatment, not lack of treatment. Plaintiff's charge that he was allowed to go lengthy periods of time without replacement of bloody bed sheets and clothing, while quite troubling, does not in and of

itself indicate a constitutional denial of medical care. In sum, the evidence does not support a finding that Defendants exhibited deliberate indifference toward Plaintiff's psoriasis and related conditions. Compare Hamm, 774 F.2d at 1575 ("This evidence shows that [plaintiff] received significant medical care while at the jail. Although [plaintiff] may have desired different modes of treatment, the care the jail provided did not amount to deliberate indifference.") with Farrow, 320 F.3d at 1247 ("finding in case involving inmate whose lack of oral hygiene caused swollen, bleeding gums along with weight loss and malnutrition that the 'substantial and inordinate [fifteen-month] delay in treatment raises a jury question as to [defendant's] deliberate indifference towards [plaintiff's] serious medical need.").

Having found no deliberate indifference towards Plaintiff's medical care, the claim that Plaintiff was denied his due process rights under the Fourteenth Amendment fails. Without an underlying deprivation of this constitutional right, Plaintiff's 42 U.S.C. § 1982 claim against each Defendant fails as a matter of law.[8] Accordingly, both defense motions for summary judgment are granted.

V. Conclusion

For the reasons set forth above, Plaintiff's notions for oral argument on Defendants' motions for summary judgment [## 58, 59] are DENIED, Defendants Gwinnett County and Conway's motion

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[8] Although the standard for holding each Defendant liable under Section 1983 varies among Defendants, without an underlying constitutional violation there can be no Section 1983 liability.

to strike [#55] is DENIED in part, GRANITED in part, Defendants Prison Health Services and Gebhardt's motion to strike [#65 is DENIED in part, GRANTED in part, Defendant Conway's motion for leave to file supplemental brief [#73] is DENIED, Defendants Prison Health Services and Gebhardt's motion for summary judgment [#43] is GRANTED and Defendants Gwinnett County and Conway's motion for summary judgment (#46] is GRANTED.

SO ORDERED, this 5 day of March, 2004.

S/Orinda D. Evans
ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE